Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues	)	CS Docket No. 99-363

To: The Commission

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

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SUMMARY

EchoStar Satellite Corporation ("EchoStar") hereby submits its comments on the provision of the recently enacted Satellite Home Viewer Improvement Act of 1999 instructing the Commission to prohibit broadcast stations from "failing to negotiate in good faith" and from "engaging in exclusive contracts" in retransmission consent negotiations with Multichannel Video Programming Distributors, including satellite carriers such as EchoStar.[1] In enacting SHVIA, Congress at last confirmed the satellite carriers' ability to provide satellite subscribers with their local broadcast signals by creating a new copyright license. This license was intended to solve a problem long-perceived by both Congress and the Commission: that the absence of local signals from satellite offerings was one of the chief factors dissuading consumers from switching to satellite services from their cable system, which could offer these signals under the broad cable copyright license. This handicap in turn has prevented satellite carriers from ushering in needed competition to the dominant cable operators and exercising some discipline on soaring cable rates.

Of course, the problem meant to be resolved by Congress would in fact remain unsolved if broadcasters were free to withhold their consent to local-into-local retransmissions or continue to distort the playing field as between cable operators and satellite carriers. Precisely to avoid this result, Congress instructed the Commission to prohibit bad faith retransmission

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[1] Act of Nov. 29, 1999, PL 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), to be codified in scattered sections of 17 and 47 U.S.C.).

negotiations and exclusive dealing by broadcasters. The NPRM invites comment on this statutory directive.

The main challenge of the Commission in implementing these prohibitions is to make them concrete, defining very specifically what constitutes bad faith and exclusive dealing, and add enforcement teeth to them. If the Commission's rules were to be so general or so narrow as to allow easy circumvention by broadcasters, the law's prohibitions would degenerate into a hollow exhortation, and the local-into-local copyright license would be nullified by the broadcasters' unfettered power to hamper or prevent local-into-local retransmissions. EchoStar is therefore heartened by the Commission's recognition that the SHVIA must be implemented "aggressively to ensure that the pro-competitive goals underlying this important legislation are realized."[2] Fortunately, Congress also gave the Commission clear guidance in that respect by indicating that differences in retransmission terms will be evidence of bad faith so long as they are not based on competitive marketplace considerations; and the retransmission marketplace offers simple yardsticks to allow the Commission to give specific content to the term "competitive marketplace considerations."

Bad Faith. In the spirit of concreteness, EchoStar agrees in principle with the NPRM's concept of a two-tiered standard for evaluating what constitutes good faith, including: (1) an objective test based on a list of *per se* violations of good faith; and (2) a subjective test based on a case-by-case evaluation of specific circumstances. The success of the concept, of course, depends on the inclusiveness of the two tests. The lists of *per se* violations developed

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[2] *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues*, CS Docket No. 99-363, ¶ 1 (rel. Dec. 22, 1999) ("NPRM").

under other types of statutory good faith obligations and mentioned in the NPRM fall far short in that respect, in part because they are not tailored to the circumstances of the retransmission marketplace, and in part because they do not take account of a key difference between the bad faith prohibition contemplated in the SHVIA and other statutory references to good faith. Specifically, as the NPRM recognizes, under the SHVIA the Commission must prohibit disparities in retransmission terms if they are not based on competitive marketplace considerations.[3] If the Commission does not give specific content to what constitutes competitive marketplace considerations, any list of other violations, no matter how extensive, would be of little consequence.

To that end, there are two sources of guidance available to the Commission. The first and most significant area to which the Commission should look is the marketplace itself – how retransmission consent agreements between cable operators and broadcasters have unfolded in real life since Congress imposed a retransmission consent requirement in 1992. Emerging from that evidence is a very consistent pattern showing that competitive marketplace considerations have led the broadcasters to give cable operators their retransmission consent either for free or at a very low cost. Generally, where the broadcaster or network has received

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[3] Specifically, SHVIA, § 1009, to be codified at 47 U.S.C. § 325(b) expressly states that different terms and conditions, if based on competitive marketplace considerations, do not constitute a failure of good faith. If follows, therefore, that different terms and conditions that are ***not*** based on such competitive marketplace considerations, ***do*** constitute a failure of good faith. In his comments on the legislation, quoted in the NPRM, Senator Kohl explains that the law was intended to "put some teeth in 'good faith' by adding the 'competition marketplace considerations' language." In the NPRM, the Commission correctly states that "adding specification to our rules should add certainty to the negotiation process and reduce the number of cases presented to the Commission for adjudication," and invites comment on the "relevance, if any," of its program access and open video system discrimination standards. NPRM at ¶ 19.

any consideration at all, it has been in the non-monetary form of carriage of certain cable networks affiliated with the broadcast entity. These "retransmission-for-carriage" deals offer strategic benefits to the broadcasters at very little or no cost to the cable operator. These deals are consistent with the Copyright Office's determination that the market value of local-into-local retransmissions is zero. Any attempt by broadcasters to extract value for retransmission consent beyond the consideration received from cable operators must be viewed as a violation of the good faith prohibition in the face of that determination.

The "retransmission for carriage" formula transcends isolated deals and forms an unmistakable norm. Thus, while comparisons to individual deals with other MVPDs might or might not be dispositive as to whether the differences are based on competitive marketplace considerations, there appears to be no such consideration justifying a departure from the market-driven retransmission-for-carriage *norm*. The general rule, therefore, should be that broadcaster demands deviating from that formula, such as demands for money, demands for carriage of additional cable networks beyond those involved in the retransmission-for-carriage agreements with cable operators, or demands for retransmission of additional broadcast stations (beyond those owned and operated by the same network), should be presumptively viewed as *not* based on competitive marketplace considerations.

In considering any exceptions to this rule, the Commission should look to the second source of guidance available to it – the exceptions to the discrimination prohibitions of the program access rules. These exceptions specifically delineate those marketplace considerations that support differential terms and conditions for carriage in the program access context: (1) reasonable financial requirements; (2) actual and reasonable differences in costs;

and (3) economies of scale.[4] At the same time, the Commission should adapt these exceptions with caution as opposed to adopting them wholesale. The implementation of the program access rules has been blunted by the very lack of enforcement teeth that, if tolerated here, would doom SHVIA to failure. One reason for the lax enforcement is the broad exceptions to the anti-discrimination rules. At a minimum, the Commission should re-confirm and vigorously apply safeguards such as placing the burden of proof for such justifications squarely on the broadcasters. The Commission should also allow discovery as of right. The questions of disparity in terms and the presence or lack of competitive marketplace considerations are intensely factual. A practice of rarely permitting discovery, as in the program access area, might encourage broadcasters to discriminate with impunity and to disguise that behavior behind vague invocations of competitive marketplace considerations, without sufficient opportunity to test these assertions through the fact-finding process.

At the same time, while the norm of cable retransmission deals is relevant to determining that more stringent terms demanded by broadcasters would presumptively not be based on competitive marketplace considerations, the fact is that, in a competitive marketplace, satellite carriers would on balance be expected to receive even better retransmission terms than cable operators, for several reasons.[5] In its evaluation of broadcasters' behavior, therefore, the

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4 47 C.F.R. § 76.1002 (b) (1)-(3).

5 Among other things, the grant of retransmission consent to a cable station may entail the loss by the broadcaster of local advertising revenues to the cable system (as advertising on cable would become more comparable to advertising on the local broadcast station for local advertisers by virtue of the fact that the cable system also carries the broadcast signal). Such losses are much less of a factor with respect to satellite retransmission, suggesting commensurately lower retransmission fees. In addition, certain carriage agreements that the broadcasters may have obtained from cable operators may have been at very low cost to the

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Commission can and should find violations of the good faith requirement even in cases where broadcasters request terms that some or many cable operators have accepted (where, for example, a term is unduly onerous for the satellite distributor).

Exclusive Dealing. The Commission should make clear that the SHVIA's required proscription on exclusive dealing extends beyond *de jure* exclusivity to *de facto* exclusionary conduct, including literal or effective refusals to deal with a particular MVPD distributor. To interpret this provision otherwise would be to permit broadcast stations to effectively engage in exclusive dealings by simply refusing to deal with other satellite distributors. Indeed, such refusals to deal should also be considered a *per se* failure of good faith. This interpretation is warranted by the language of the statute, which suggests Congress' intent to prohibit, not just "entering" into specific exclusive agreements, but also "engaging" in exclusive contracts generally. The Commission has correctly seized on the relevance of Congress's choosing the broad verb "engage"; in EchoStar's view, the authoritative statutory text should prevail over the reference to "entering" into agreements in the legislative history. In addition, several courts have interpreted "exclusive dealing" broadly as a party's choosing "with whom he will do business and with whom he will not do business." *See Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567 (11th Cir. 1991); *see also Construction Aggregate Transp. Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752, 772-73 (11th Cir. 1983) (exclusive dealing is practice of choosing to deal with some and not others). A narrower construction by the Commission would only open the path to circumvention of the ban on exclusivity.

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cable system, whereas similar carriage concessions may be impossible or prohibitively costly for a satellite carrier.

Procedure. In developing rules of procedure for the adjudication of retransmission complaints, the Commission should adapt its program access procedural rules, with some significant adjustments necessary to make the bad faith and exclusive dealing prohibitions a more effective deterrent on such behavior than the program access rules have been. Among other things, as explained above, the Commission should allow discovery as of right. The Commission should also adopt a more liberal policy allowing damages than in the program access area, and recognize the "discovery" rule as tolling the statute of limitations, particularly since, in many cases, the information necessary to discover a violation of the rules will be in the exclusive possession of the broadcasters.

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local signals from satellite offerings was one of the chief factors dissuading consumers from switching to satellite services from their cable system, which could offer these signals under the broad cable copyright license. This handicap in turn has prevented satellite carriers from ushering in needed competition to the dominant cable operators and exercising some discipline on soaring cable rates.

Of course, the problem meant to be resolved by Congress would in fact remain unsolved if broadcasters were free to withhold their consent to local-into-local retransmissions or continue to distort the playing field as between cable operators and satellite carriers. Precisely to avoid this result, Congress instructed the Commission to prohibit bad faith retransmission negotiations and exclusive dealing by broadcasters. The NPRM invites comment on this statutory directive. The main challenge of the Commission in implementing these prohibitions is to make them concrete, defining very specifically what constitutes bad faith and exclusive dealing, and add enforcement teeth to them.

I. BACKGROUND

To give content to the SHVIA prohibitions on exclusive dealing and bad faith negotiations, including on term disparities that are not based on "competitive marketplace considerations," it is crucial to survey what exactly *has* happened in the marketplace – the retransmission negotiations and agreements between broadcasters and cable systems or other MVPDs as they have unfolded since the creation of the retransmission consent requirement in 1992. What emerges from this survey is *not* a picture of a random group of isolated and diverse deals. Rather, the history of retransmission consent clearly illustrates an almost invariable norm – the broadcasters providing retransmission consent at little or no cost to the cable operators.

Thus, while comparison of the broadcasters' dealing with a satellite carrier such as EchoStar to another isolated deal with another MVPD might or might not be dispositive in determining whether the variances are due to competitive considerations, comparisons to the *norm* are extremely probative, especially because the pattern was molded in the marketplace between negotiating parties that have more evenly balanced bargaining power than here. This evidence therefore supports a presumptive rule that terms more stringent than the norm are not based on competitive marketplace considerations.

In December 1992, shortly after passage of the Cable Act and several months before retransmission consent was scheduled to take effect, Twentieth TV became the first broadcaster to waive its claim to retransmission consent payments. During that same period, Tele-Communications, Inc. ("TCI") vowed not to pay for retransmission consent.[2] Soon thereafter, the top cable Multiple System Operators ("MSO"s) entered into retransmission-for-carriage deals covering the owned and operated stations of Fox Television Stations, Inc. ("Fox"), National Broadcasting Company ("NBC") and American Broadcasting Company, Inc. ("ABC"):

> ABC tied negotiations for their station to carriage of ESPN2; NBC got renewals for CNBC and rollout commitments for America's Talking in return for carriage of their stations. Fox, working with

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[2] Dennis Wharton, "20th Waives Claim to Retrans," *Daily Variety*, December 4, 1992 at 1. It is reported that by the end of the initial push for retransmission deals, TCI reached agreement with all but seven stations in five markets, signing more than 400 non-cash deals. Joe Flint, "Stations Stay for No Pay; TV Stations Prefer Barter Deals Over Cash in Retransmission-Consent Deals," *Broadcasting & Cable*, October 11, 1993 at 6. *See also* Robert Marich, "street Cheers Par's Initiative," *The Hollowood Reporter,* October 27, 1993 (in the summer of 1993, Chris-Craft Industries, Inc. granted cable retransmission consent for its six TV stations to TCI without payment. Reports speculate that consideration may have been carriage of the Paramount Network on TCI systems).

its affiliates, went after rollout commitments for its cable network FX, in return for carriage of Fox stations and its affiliates.[3]

The only major network that failed to sign on to this plan, CBS, found that the unfolding market dynamic was not an easy one to alter. When CBS attempted to require payment for retransmission consent, cable operators were unwilling to accept any such demand.[4] In a final attempt, CBS offered to buy into NewSport, a new cable sports news channel owned by TCI's Liberty Media, NBC and Cablevision's Rainbow Holdings.[5] CBS sought a 70% stake and management control in exchange for retransmission consent for its owned and operated stations. CBS had no takers.[6] CBS even tried, and failed, to secure retransmission-for-carriage deals.[7] As

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3 Joe Flint, "Stations Stay for No Pay; TV Stations Prefer Barter Deals Over Cash in Retransmission-Consent Deals," *Broadcasting & Cable*, October 11, 1993 at 6. *See also* "Retransmission Consent Truces Declared," October 11, 1993, This Week's News (KPIX in San Francisco (CBS) signed with virtually all Bay Area cable systems in exchange for carriage of America's Talking in most cases; As a vehicle for consent deals, Fox signed carriage deals for its then-new FX network with 10 MSOs, including Cablevision Industries, Century, Crown, Colony, Marcus, Pegasus Capital, Post-Newsweek, Telesat Cablevision, Western; Cable vision Systems signed long-term noncash retransmission deals with Cap/ABC and Hearst; separate agreements called for carriage of ESPN2).

4 Jon LaFayette, "Fox, AT&T Ink a Digital Deal; 10-Year Pact, No Retransmission Payout," *Electronic Media*, September 6, 1999 at 1.

5 Joe Flint, "CBS Blinks, Leaves Table Empty Handed: Network Gives Up on Getting Cash for Signals or Carriage of New Channel ; Retransmission Consent," *Broadcasting & Cable*, October 4, 1993 at 6.

6 Joe Flint, "CBS Blinks, Leaves Table Empty Handed: Network Gives Up on Getting Cash for Signals or Carriage of New Channel; Retransmission Consent," *Broadcasting & Cable*, October 4, 1993 at 6. For example, under TCI's 1993 agreement with NBC, NBC consented to retransmission of the 6 NBC owned and operated stations in exchange for continued carriage of CNBC and assistance in launching America's Talking, NBC's then new cable channel. *Chicago Tribune,* September 29, 1993 at 1, Business; Barry Layne, "BNC, TCI Ink Retrans. Accord," September 28, 1992. NBC signed similar deals with many other MSOs, including Time Warner, Continental, Adelphia, Booth American, Colony, Columbia International, Jones, Post-Newsweek, Sammons, Simmons, Times Mirror, Triax. "'Option' for Affiliates; CBS Gives up on Retransmission Consent – For this Year," *Communications Daily*,

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a result, CBS eventually agreed to offer its stations to cable companies for one year *for free.*[8] "CBS became the only network not to reach some kind of financial agreement with cable companies."[9]

Likewise, attempts by broadcast stations not owned by the networks to extract payment for retransmission consent generally met with resounding failure. The negotiations

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September 28, 1993 at 1. NBC's deals with Colony Communications, Inc. Newhouse Broadcasting Co. and Telecable Corporation likewise contemplated carriage of CNBC and America's Talking. "NBC Reaches Retransmission Consent Agreements with Three MSO's," *PR Newswire*, September 29, 1993, Entertainment, Television and Culture.

7 Kitty Pilgrim, "Time Warner Set to Launch Fifth Network," *CNN Moneyline* Transcript, August 26, 1993 ("Like the other broadcast networks, CBS is also using a new cable channel as a bargaining chip in the retransmission negotiations. CBS and Comcast will create a cable channel devoted to public affairs and news programming and news programming, and Comcast will pay an undisclosed fee to retransmit its programming; but other cable giants may not be willing to go along. A Time Warner spokesman [Mike Luftman], for example says 'We're not willing to pay an exorbitant price for a new cable channel that's simply a disguised backdoor retransmission fee.'").

8 "Group W, Gaylord in Talks; CBS Near Cable Strategy," *Electronic Media*, August 8, 1994 at 1; *see also* John M. Higgins and Richard Katz, "Can CBS Find a Cable Play? Westinghouse Soft-Pedals Retransmission; CBS, Inc.; Westinghouse Electric Corp.," *Multichannel News*, July 29, 1996 at 1; John Huey and Andrew Kupfer, "What that Merger Means For You," *Fortune*, November 15, 1993 at 82 ("CBS . . . was recently forced to let cable operators retransmit its programs for free."); Joe Flint, "CBS Blinks, Leaves Table Empty Handed: Network Gives Up on Getting Cash for Signals or Carriage of New Channel; Retransmission Consent," *Broadcasting & Cable*, October 4, 1993 at 6. *See also* "Suburban Cable Receives Permission to Retransmit WCAU-TV," *PR Newswire,* September 29, 1993, Financial News (Suburban received free retransmission consent for two CBS stations); Kitty Pilgrim, "Time Warner Set to Launch Fifth Network," *CNN Moneyline* Transcript, August 26, 1993 ("[T]he stand-off between broadcast and cable over retransmission fees has apparently ended, and its the broadcast networks that blink – CBS joining other networks in abandoning – [sic] to their demands that cable systems make large payments to keep carrying networked-owned stations.")

9 Electronic Media Staff, "1993: The Year in Review," *Electronic Media,* December 27, 1993 at 4.

between WCSH-TV, the Portland, Maine NBC affiliate, and Time Warner were a characteristic example. In 1993, the broadcaster removed its signal from Time Warner's cable system when it was unable to secure a cash payment for retransmission consent. In the end, the NBC affiliate had to give Time Warner retransmission consent *and substantial additional compensation* to secure carriage.[10]

Ever since these formative years of retransmission negotiations, the retransmission-for-carriage formula has withstood the test of time. In 1997, Time Warner agreed to carry CBS's Eye on People, and in exchange received an agreement for long term carriage of WCBS, the CBS-owned station in New York.[11] In the same year, Jones Intercable too received retransmission consent of KCBS in exchange for carrying Eye on People.[12]

In 1999, TCI's successor AT&T Broadband & Internet Services ("AT&T") entered into two retransmission agreements with NBC and Fox where, again, AT&T did not pay for retransmission of either network's stations.[13] "Neither company is paying anything for the

10 Reportedly, under the agreement, Time Warner received $35,000 worth of ad spots annually to promote its cable system from the station over the next 4 years; and the right to carry any NBC programming the station pre-empts, which includes much of NBC's sports programming. Time Warner was also able to obtain a waiver from the station of its syndicated rights. "Retrans Turnabout in Maine; WCSH-TV in Portland, Maine Returns to Time Warner Cable System," *Broadcasting & Cable*, November 8, 1993 at 11. *See also* "Retransmission Consent Truces Declared," October 11, 1993, This Week's News (KNBC-TV in Los Angeles (NBC) signed a 6-year deal with Century in exchange for carriage of NBC's new America's Talking network).

11 John Dempsey, "Cable Wabsrack Up IOUs in TW's Gotham," *Variety*, September 8-14, 1997 at 25.

12 "Cable Channels Added," August 29, 1997 at AV2.

13 *See* Jim McConvile, "NBC Puts All it's Got on AT&T: Deal Locked in for Eight Years," *Electronic Media*, June 14, 1999 at 1; Jon LaFayette, "Fox, AT&T Ink a Digital Deal; 10-Year Pact, No Retransmission Payout," *Electronic Media*, September 6, 1999 at 1. Jim

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digital or retransmission agreements."[14] The recent December 1999 agreement between Time Warner and Fox follows the same pattern, as it contemplates no cash payments in exchange for retransmission of Fox's 22 owned and operated stations on all applicable Time Warner cable systems.[15]

The highly publicized retransmission negotiations between Cox and Fox revolved, again, around carriage: the dispute between the two companies (recently settled) was simply whether Cox will agree to carry Fox's affiliated cable networks Fox Sports World and FXM on digital tiers nationwide.[16] No cash payment to Fox was ever in question, and the settlement apparently involved no such payment. Likewise, ongoing discussions of Disney/ABC with Time Warner and MediaOne appear to center on carriage of Disney's SoapNet cable network as a possible part of a new retransmission agreement.[17] And a retransmission dispute between Time

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McConvile, "NBC Puts All it's Got on AT&T: Deal Locked in for Eight Years," *Electronic Media*, June 14, 1999 at 1. Jim Forkan, "AT&T, Fox Ink 10-Year Retrans Deal; With Fox Television Stations, Inc.," *Multichannel News*, September 6, 1999 at 3

[14] Jim McConvile, "NBC Puts All it's Got on AT&T: Deal Locked in for Eight Years," *Electronic Media*, June 14, 1999 at 1. Jon LaFayette, "Fox, AT&T Ink a Digital Deal; 10-Year Pact, No Retransmission Payout," *Electronic Media*, September 6, 1999 at 1. While AT&T agreed to pay increased per-subscriber fees to carry MSNBC and CNBC thorough 2008, these fees undoubtedly reflected the fact that the two cable networks had become substantially more established and popular in the years since their launch.

[15] Michael Schneider, "News Corp. Finds Time for a Deal," *Daily Variety*, December 29, 1999 at 1.

[16] "The Region in Review; Cox, Fox Cable TV Dispute Resolved – At Least for Now," *The Washington Post*, January 9, 2000 at C2; Michael D. Shear and William Banigin, "Agreement Called Victory for Viewers; Fox Returns to Cox Cable in Fairfax," *The Washington Post*, January 7, 2000 at A1.

[17] Joe Flint, "Battle Over Retransmission Blocks Fox TV Stations from Cox Cable," *Wall Street Journal*, January 3, 2000.

Warner and CBS affiliate WBNS-TV concerned the carriage of the Ohio News Network, a regional cable network controlled by WBNS-TV's parent Dispatch Broadcast Group. That dispute too was reportedly resolved. Significantly, Time Warner did not agree to carry ONN; rather, the parties agreed to continued retransmission on the terms of the prior agreement and to continued discussion of ONN carriage.

Of the two satellite carriers, EchoStar has only been able to reach a retransmission agreement with one network, Fox, for the carriage of its owned and operated stations. That deal too did not involve any cash payments. For its part, DirecTV Enterprises, Inc. ("DirecTV") has recently reached multi-year retransmission consent agreements with Fox, Disney/ABC and NBC.[18] While the terms of these deals have generally not been reported, the agreement with ABC reportedly included carriage of SoapNet.[19]

EchoStar currently distributes on its DISH Network most of the broadcast-affiliated cable networks whose carriage by cable operators has constituted the consideration for retransmission consent. For example, EchoStar carries today four different ESPN cable networks (ESPN, ESPN Classic, ESPN2 and ESPN News); CNBC and MSNBC; and several other NBC, ABC, CBS and Fox affiliates. Most agreements for carriage of these networks are

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[18] Monica Hogan, "DirecTV Signs Retrans Deals with Fox," *Multichannel News*, October 4, 1999 at 22; "DirecTV and Fox Reach Agreement," *DTV Business*, October 18, 1999. "ABC and DirecTV Reach Agreement for Retransmission of ABC Owned Television Stations; DirecTV Will Also Carry Disney/ABC Cable Networks' Soapnet," *Business Wire*, December 6, 1999; *see also* Christopher Stern, "New Direct Linkup; Satcaster Quills Deals with Peacock, Alphabet," *Daily Variety*, December 7, 1999 at 8. *Satellite* Week, December 13, 1999, Satellite TV.

[19] "ABC and DirecTV Reach Agreement for Retransmission of ABC Owned Television Stations; DirecTV Will Also Carry Disney/ABC Cable Networks' Soapnet," *Business Wire*, December 6, 1999.

generally set to expire, depending on the particular case, in 2000, 2001 or 2002. On the other hand, EchoStar does not now carry certain of the broadcast-affiliated cable networks involved in recent retransmission deals, such as SoapNet, FXM and Fox Sports World.

II. THE COMMISSION MUST AGGRESSIVELY IMPLEMENT SHVIA'S GOOD FAITH REQUIREMENT

The Commission must give concrete content to, and aggressively implement, SHVIA's good faith requirement. As the Commission acknowledges, in adopting Section 325(b)'s good faith requirement, "Congress signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process."[20] Accordingly, the Commission must adopt "substantive and procedural rules that are clear and subject to swift and effective enforcement."[21]

Section 325(b) requires the Commission to adopt regulations which:

> . . . prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in ***good faith***, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on ***competitive marketplace considerations***.[22]

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20 NPRM, ¶ 15.

21 *Id.*

22 47 U.S.C. § 325(b)(3)(C)(i) (emphasis supplied).

In the NPRM, the Commission requests comment on how to interpret the crucial terms in this provision, *i.e.*, "good faith" and "competitive marketplace considerations."[23]

In EchoStar's view, a general definition of "good faith," such as that included in Black's Law Dictionary or the UCC, would not add significant value in the Commission's effort to develop and enforce concrete good faith rules, particularly (as will be discussed extensively below) in light of a very distinctive characteristic of this statutory good faith obligation – that demands for different terms constitute lack of good faith when not backed by competitive marketplace considerations.[24] EchoStar does agree in principle with the NPRM's concept of a two-tiered standard including: (1) an objective test based on a list of *per se* violations of good faith; and (2) a test based on a case-by-case evaluation of specific circumstances.[25] Such a two-tiered test has the potential to provide the Commission with the specificity necessary to "add certainty to the negotiation process and reduce the number of cases presented to the Commission for adjudication."[26] It could also speed the adjudicatory process when conflicts require Commission intervention.

Of course, the success of any test depends on how inclusive it is. The "*per se*" lists developed to implement good faith duties prescribed by other statutes, such as the 1996 Telecommunications Act's good faith requirement pertaining to negotiations between incumbent

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23 NPRM, ¶¶ 14-19.

24 NPRM, ¶ 15.

25 NPRM, ¶ 16-17.

26 NPRM, ¶ 19.

local exchange carriages ("LECs") and their competitors ("CLECs"), 47 U.S.C. § 251(c)(1), are seriously under-inclusive and in several respects inapposite, for two reasons.[27]

First, the Commission should list several additional types of per se prohibited behavior. The LEC list of *per se* violations is not tailored to the circumstances of the retransmission marketplace. Indeed, just as this list contains some items that are not relevant to the negotiations between a broadcast station and a satellite distributor, so too does it omit items that are relevant to such negotiations. Thus, while most instances of bad faith behavior recited in 47 C.F.R. § 51.301 are potentially relevant in the retransmission area,[28] almost all of these items do not capture the core of the problems that satellite carriers expect to encounter or are already facing. Based on EchoStar's experience and expectations, the list of *per se* violations should

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27 To implement that good faith requirement, the Commission has developed a list of per se violations set forth in 47 C.F.R. § 51.301(c): (1) Demanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a State Commission, or in support of a request for arbitration under section 252(b)(2)(B) of the Act; (2) Demanding that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law; (3) Refusing to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules; (4) Conditioning negotiation on a requesting telecommunications carrier first obtaining state certification; (5) Intentionally misleading or coercing another party into reaching an agreement it would not otherwise have made; (6) Intentionally obstructing or delaying negotiations or resolution of disputes; (7) Refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and (8) Refusing to provide information necessary to reach agreement.

28 These include: demands for non-disclosure agreements or for waivers of FCC rights, refusal to allow amendment of agreements, conditioning agreement on certain regulatory approvals, misleading or coercing, obstructing or delaying, refusing to designate a representative with authority to make binding representations, and refusing to provide necessary information. EchoStar includes adjusted versions of these items in its proposed list of per se violations, attached as Appendix A.

also include the following:

- conditioning retransmission on the satellite carrier's not exercising to the fullest extent its rights to retransmit local or distant broadcast signals under the Copyright Act or the Communications Act (for example, conditioning local-into-local retransmission in a certain market on not retransmitting distant signals to the extent allowed in that market);
- conditioning retransmission on carriage of other broadcast stations in other local markets;[29]
- conditioning retransmission on carriage of digital signals;[30]
- conditioning retransmission on carriage of a second broadcast station in the same local market;[31]

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29 Congress left to satellite carriers the determination of which markets to serve, and, for that reason, did not impose any must-carry obligation in a local market unless the carrier has decided to serve, and serves, that market. *See* SHVIA, Section 1008, to be codified at 47 U.S.C. § 338(a) ("each satellite carrier ***providing***, under section 122 of Title 17, United States Code, secondary transmissions to subscribers located ***within the local market*** of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located ***within that local market***, subject to section 325(b).") (emphasis supplied). A requirement of carrying stations in other markets before a multi-station owner grants its consent to the retransmission of any one station would exceed through the backdoor the already excessive carriage obligations delineated by Congress. Such demands would be all the more unreasonable in light of the spectrum constraints facing satellite carriers. As the Commission knows, to add one local channel in any one local market, EchoStar must currently dedicate one channel's spectrum equivalent throughout the country – in other words, that spectrum becomes unusable for the rest of the country – a very heavy toll on the spectrum-limited DBS systems. Because of these constraints, the satellite carrier's discretion to decide which and how many markets to serve is an essential part of the statutory scheme.

30 The must-carry obligations imposed by Congress do *not* extend to digital signals, and such a digital carriage requirement would be an attempt to exceed and rewrite those statutory obligations. EchoStar also notes that, by agreeing to carry the digital signals of a network's stations, a cable operator would be merely agreeing to add one channel to each of its systems. For a satellite carrier, the spectrum expenditure would be much more severe: each additional signal would require the dedication of cumulative nationwide capacity on EchoStar's nationwide system (thus, an additional channel for each of 10 cities would require 10 dedicated channels nationwide). While such a requirement might be acceptable to a cable system, it would be impossible to meet for a satellite operator.

- requesting specific channel numbers;
- refusing to provide a high-quality direct feed;
- insisting on unreasonably short agreement terms;
- threatening to run anti-satellite advertising;
- refusing to deal. Refusals to deal, whether explicit or disguised under requests for extortionate terms, should be an absolutely required component of the list of *per se* violations. EchoStar notes in this respect that the Commission's list of *per se* violations in the area of LEC-CLEC negotiations need not include this item because the statute specifically requires LECs to provide interconnection. Here, the only protection available to satellite carriers is the good faith requirement (and the prohibition on exclusive dealing, *see below*), and there ought to be no doubt that explicit or effective refusals to deal are one of the most pernicious instances of bad faith.

Second, the Commission should presumptively prohibit deviations from the norm of retransmission-for-carriage deals between broadcasters and cable operators. The lists of good faith violations mentioned in the NPRM do not take account of a key difference between the bad faith prohibition contemplated in the SHVIA and other statutory references to good faith. Specifically, as the NPRM recognizes, under the SHVIA the Commission must prohibit disparities in retransmission terms if they are not based on competitive marketplace considerations. By contrast, Section 252(i) of the Telecommunications Act requires a LEC to

[31] The Commission appears to be alert to the possibility of such tying attempt by broadcasters, as the NPRM requests comment on the relevance of the Commission's recent decision to relax the television broadcast ownership rules to permit companies to own two television broadcast stations within a given market. NPRM, ¶ 19. The Commission should make clear that such tying too arrangements are unacceptable: any attempt to secure retransmission of additional broadcast signals would effectively be attempts to circumvent the limitations to, and timing of, the carriage obligations imposed by Congress on satellite carriers. These obligations are already excessively intrusive, and the Commissioner should resist attempts to further expand them through the back door of attaching them to a retransmission deal.

interconnect with all CLECs on the same terms and conditions, obviating any need for the Commission to determine which instances of discrimination violate the good faith prohibition.

Section 325(b) expressly states that different terms and conditions, if based on competitive marketplace considerations, do not constitute a failure of good faith. If follows, therefore, that different terms and conditions that are ***not*** based on such competitive marketplace considerations, ***do*** constitute a failure of good faith. In his comments on the legislation, quoted in the NPRM, Senator Kohl explains that the law was intended to "put some teeth in 'good faith' by adding the 'competition marketplace considerations' language." Likewise, the Conference Report explains that the Commission "may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations." In the NPRM, the Commission correctly acknowledges that it must delineate specifically what does and does not constitute "competitive marketplace considerations," and invites comment on the "relevance, if any," of its program access and open video system discrimination standards. NPRM at ¶ 19. In EchoStar's view, any list of *per se* violations of the good faith requirement would be inconsequential without specific rules regarding the meaning of that key term. To develop such rules, the Commission can look to two sources for guidance: (1) the marketplace itself; and (2) the Commission's own program access rules.

The retransmission marketplace. The first and most significant area to which the Commission should look is the marketplace itself – how retransmission consent agreements between cable operators and broadcasters that have unfolded in real life since Congress imposed a retransmission consent requirement in 1992. As EchoStar has shown above, emerging from that evidence is a very consistent pattern showing that competitive marketplace considerations have led the broadcasters to give cable operators their retransmission consent either for free or at a very low cost. Generally, where the broadcaster or network has received any consideration at all, it has been in the non-monetary form of carriage of certain cable networks affiliated with the broadcast entity. These "retransmission-for-carriage" deals offer strategic benefits to the broadcasters at very little or no cost to the cable operator. In particular, the cost to the cable operator of carrying a broadcast-affiliated cable network (assuming limited shelf-space) is no more than the opportunity cost it incurs in therefore not being able to carry another, presumably more popular cable network – a negligible amount.

Notably, another federal agency has looked at precisely these retransmission transactions and has reached already an authoritative conclusion about what is the market value of retransmission evidenced by the marketplace: *zero.*[32] Indeed, in establishing a royalty rate for local-into-local retransmissions for purposes of the statutory copyright license of Section 119, the Copyright Office held in 1998 that the retransmission of local superstation signals into local areas and the retransmission of local network signals into local unserved households have a zero value.[33] Specifically, the Copyright Office's Copyright Arbitration Royalty Panel first looked at

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32 The Commission should not confuse the market value of network retransmissions with the crucial importance of local network signals to satellite carriers. These signals are important because they are controlled by the networks and because they have so far been generally unavailable to satellite carriers, while their cable competitors have offered them having secured them at little or no cost. The resulting acute need of satellite distributors for those signals is consistent with the close to zero market value of a marginal unit of retransmission. By the same token, the fundamental importance of water (or indeed air) to life does not support a high market value, which in a competitive market is based on the cost of the last drop.

33 *In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Report of the Copyright Arbitration Royalty Panel, ("CARP Report"), adopted by the Copyright Royalty Tribunal, 47 FR 19052 (1992), affirmed by the Register of Copyrights, Copyright Office, 62 FR 55742 (1997) ("*Final Order*").

the market value for local-into-local retransmissions of superstations. Based in part on the history of retransmission consent negotiations, the Panel found not only that superstations benefit from obtaining more viewers through retransmission, but that they copyright owners themselves have already been compensated for the use of their work:

> The copyright owners have already sold the rights to transmit their programming to the entire local market. They have been fully compensated and are not injured by retransmission into the same market. We recognize that copyright owners are free to attempt to obtain additional compensation for this separate use of their work. We simply believe they would likely fail in that endeavor.[34]

In short, the CARP concluded, "we are unpersuaded that in a hypothetical free market, superstations would risk non-carriage in their local markets by insisting upon cash payments . . . We find the rate that most clearly represents the fair market value of local superstation transmission is zero."[35]

The Copyright Office not only upheld the Panel's recommendation in its ruling, but expanded it to include the retransmission of local broadcast signals into local unserved households: "The Register recommends that the Librarian adopt a zero rate for local retransmissions of network signals to unserved households because the Register is persuaded that the Panel's conclusions with respect to local retransmissions of superstations are equally applicable to local retransmissions of network signals to unserved households."[36] Any attempt by broadcasters to extract value for retransmission consent beyond the consideration received

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[34] CARP Report, 52 (citations omitted).

[35] CARP Report, 53.

[36] *Final Order*, 62 FR 55753.

from cable operators must be viewed as a violation of the good faith prohibition in the face of that determination.

The "retransmission for carriage" formula transcends isolated deals and forms an unmistakable norm. Thus, while comparisons to individual deals with other MVPDs might or might not be dispositive as to whether the differences are based on competitive marketplace considerations, there appears to be no such consideration justifying a departure from the market-driven retransmission-for-carriage *norm.*[37] The general rule, therefore, should be that broadcaster demands deviating from that formula, such as demands for money, demands for carriage of additional cable networks beyond those involved in the retransmission-for-carriage agreements with cable operators, or demands for retransmission of additional broadcast stations (beyond those owned and operated by the same network), should be presumptively viewed as *not* based on competitive marketplace considerations. The Commission should create this presumption to aid it in the case-by-case determination of good faith violations – the second tier of its test.

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[37] The Commission should resist any argument that it should ignore the pattern created by the deals with cable operators because of the cable operators' market power. Of course, the networks possess substantial market power too: There are only 4 (or, at most 6) purveyors of network programming, and consumers expect an MVPD to provide all four local network stations. If anything, therefore, the countervailing buying power of cable operators suggests more evenly balanced bargaining positions and is therefore a far closer proxy for a competitive marketplace than the negotiations between broadcasters and a satellite carrier such as EchoStar. In fact, it would be ironic if the Commission allowed broadcasters to justify differences in retransmission terms between cable systems and EchoStar by invoking the market power exercised by cable operators, and thus countenanced the perpetuation of that market power on the ground that cable operators have successfully exercised it. Such a vicious circle would be all the more absurd in the face of the unmistakable Congressional intent to constrain cable market power.

Justifications available to the broadcasters. In considering any exceptions to this rule, the Commission should look to the second source of guidance available to it – the exceptions to the discrimination prohibitions of the program access rules. These exceptions specifically delineate those marketplace considerations which support differential terms and conditions for carriage in the program access context: (1) reasonable financial requirements; (2) actual and reasonable differences in costs; and (3) economies of scale.[38] At the same time, the Commission should adapt these exceptions with caution as opposed to adopting them wholesale. The implementation of the program access rules has been blunted by the very lack of enforcement teeth that, if tolerated here, would doom SHVIA to failure. One reason for the lax enforcement is the broad exceptions to the anti-discrimination rules. At a minimum, the Commission should re-confirm and vigorously apply safeguards such as placing the burden of proof for such justifications squarely on the broadcasters, especially since there generally do not appear to be cost differences or economies of scale justifying different terms for satellite versus cable retransmissions. The Commission should also allow discovery as of right. The questions of disparity in terms and the presence or lack of competitive marketplace considerations are intensely factual. A practice of rarely permitting discovery, as in the program access area, might encourage broadcasters to discriminate with impunity and to disguise that behavior behind vague invocations of competitive marketplace considerations, without sufficient opportunity to test these assertions through the fact-finding process.

[38] 47 C.F.R. § 76.1002 (b) (1)-(3).

At the same time, while the norm of cable retransmission deals is relevant to determining that more stringent terms demanded by broadcasters would presumptively not be based on competitive marketplace considerations, the fact is that, in a competitive marketplace, satellite carriers would on balance be expected to receive even better retransmission terms than cable operators, for several reasons. Among other things, the grant of retransmission consent to a cable station may entail the loss by the broadcaster of local advertising revenues to the cable system (as advertising on cable would become more comparable to advertising on the local broadcast station for local advertisers by virtue of the fact that the cable system also carries the broadcast signal). Such losses are much less of a factor with respect to satellite retransmission, suggesting commensurately lower retransmission fees. In addition, certain carriage agreements that the broadcasters may have obtained from cable operators may have been at very low cost to the cable system, whereas similar carriage concessions may be impossible or prohibitively costly for a satellite carrier. In its evaluation of broadcasters' behavior, therefore, the Commission can and should find violations of the good faith requirement (under both the *per se* and the case-by-case tiers of its test) even in cases where broadcasters request terms that some or many cable operators have accepted (where, for example, a term is unduly onerous for the satellite distributor).

III. THE COMMISSION MUST AGGRESSIVELY IMPLEMENT SECTION 325'S PROHIBITION ON EXCLUSIVITY

The Commission similarly must aggressively implement Section 325's prohibition on exclusivity. Section 325(b) requires the Commission to "prohibit a television broadcast station that provides retransmission consent from ***engaging in exclusive contracts***."[39] In keeping with the Commission's desire to ensure Congress' pro-competitive goals are realized, EchoStar urges the Commission to adopt a broad interpretation of this provision which prevents broadcast stations from effectively engaging in exclusive contracts by refusing to deal with competing satellite distributors.[40]

The broad interpretation proposed here is supported both by the language of the statute itself and by established antitrust law. ***First,*** as the Commission noted, Section 325(b) prohibits a broadcast station from "engaging" rather than "entering" into exclusive retransmission consent agreements.[41] This choice of language suggests Congress' intent to prohibit, not just specific exclusive agreements, but also exclusive practices.

Second, several courts have interpreted "exclusive dealing" broadly as a party's choosing "with whom he will do business and with whom he will not do business." See Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567 (11th Cir. 1991); see also Construction Aggregate Transp. Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 772-73 (11th Cir. 1983)

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39 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis supplied).

40 Indeed, as EchoStar has pointed out above, such a refusal to deal should also be considered a *per se* failure of good faith.

41 NPRM, ¶ 23.

(exclusive dealing is practice of choosing to deal with some and not others). A narrower construction by the Commission would only open the path to circumvention of the ban on exclusivity.

Finally, ***third,*** EchoStar notes that the Commission's existing prohibition on exclusivity, even without the benefit of SHVIA's specific guidance, indicates an intent to broadly prohibit exclusive dealing and find such dealing in cases where any distributors (not necessarily all distributors but one) are excluded:

> Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make an agreement with one multichannel distributor for carriage, to the exclusion of other multichannel distributors.

47 C.F.R. § 76.64(m).

IV. THE COMMISSION MUST ADOPT PROCEDURAL RULES TO EFFECTIVELY ENFORCE SECTION 325(B)'S GOOD FAITH AND EXCLUSIVITY PROVISIONS

The Commission must adopt procedural rules to effectively enforce Section 325(b)'s good faith and exclusivity provisions. In developing such procedural rules, the Commission should adapt its program access procedural rules, with some significant adjustments necessary to make the bad faith and exclusive dealing prohibitions a more effective deterrent on such behavior than the program access rules have been.

First, the Commission requests comments on how the burden of proof should be allocated for retransmission consent complaints proceedings.[42] As the Commission notes, its program access rules employ a shifting burden of poof: once a complaining party makes a *prima*

[42] NPRM, ¶ 27.

facie showing, then burden then shifts to the defending party to disprove the allegations.[43] Such a shifting burden approach is also appropriate here. Specifically, the Commission should make clear that a complaining party's *prima facie* showing will be made once it alleges a *per se* violation and supports this allegation by an affidavit. With respect to the factual questions of whether a broadcaster's demands are for different terms than those enjoyed by other MVPDs and whether the difference is based on competitive marketplace considerations, the satellite carrier should be required to request all the necessary information from the broadcaster. Such a rule should parallel the Commission's current program access rules, which permit an aggrieved MVPD to request comparative information from a vendor. As under those rules, if the vendor does not provide the requested information, the MVPD may file a complaint based on information and belief, supported by an affidavit.[44] The Commission will then accept the complainant's rate allegations as true for purposes of a *prima facie* determination.[45] Similarly, since a broadcaster's requests for more stringent terms than the "retransmission for carriage" norm of the cable retransmission deals should be viewed as presumptively not based on competitive considerations, the satellite carrier's allegations, supported by an affidavit setting forth the carrier's information and belief, should be sufficient to establish the presumption.

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[43] NPRM, ¶ 27, n. 57. (citing *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd. 3359, 3416-22 (1993) ("*MVPD Order*")).

[44] *MVPD Order*, ¶ 126.

[45] *Id.*

Consistent again with the program access rules, the burden should shift to the defendant broadcaster to prove one of the available competitive justifications.

Second, the Commission should allow discovery as of right in a retransmission consent complaint proceeding. Discovery is necessary in any truly effective adjudicatory process – particularly where, as here, the questions are so fact-intensive and many of the facts are bound to be in the broadcasters' exclusive custody. In addition, the Commission should make clear that the statute of limitations begins to toll for purposes of a retransmission consent complaint only once the violation is discovered by the affected satellite carrier. Again, this is because, in many cases, the information necessary to discover a violation of the rules will be in the exclusive possession of the broadcasters.

Third, the Commission should also adopt a liberal policy of allowing damages, both as a deterrent to unlawful conduct and as compensation to injured parties. In the program access area, the Commission recognized that it is appropriate to "compensat[e] . . . victims of clear-cut anti-competitive conduct which violates the program access rules. Restititution in the form of damages is an appropriate remedy to return improper gains obtained by vertically-integrated programmers to unjustly injured MVPDs."[46] Yet in establishing the availability of damages in the program access area, the Commission stated that it would not impose damages where "a program access defendant relies upon a good faith interpretation of an ambiguous

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[46] *In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd. 15822, ¶ 17 (1998).

aspect of the program access provisions for which there is no guidance . . ."[47] The Commission also stated that "[w]here a violation is found, the Cable Services Bureau ("Bureau") will indicate in its order whether the violation is the type for which the Commission will impose damages or forfeiture."[48]

These limitations are inappropriate and detract from the threat of damages as a sufficient deterrent to violations of the bad faith and exclusive dealing prohibitions. To reduce the relevance of any claims of misinterpretation of the rules by the broadcasters, the Commission should simply ensure that its retransmission consent rules provide clear guidance in advance as to the nature and scope of their obligations, instead of leaving broadcasters an opportunity to escape damages through resort to such claims. In short, a broader damages rule is necessary to remedy the anti-competitive effect of any violation, and will also serve as a significant disincentive to violate the Commission's rules in the first place.

Finally, since the need to secure retransmission consent is an extremely urgent one for satellite carriers and consumers alike, the Commission should impose limits on the duration of retransmission complaint proceedings. The Commission should specifically resolve that it will adjudicate allegations of exclusive dealing and *per se* violations within 4 months of the filing of a complaint, and that allegations of differentials not based on competitive marketplace considerations will be adjudicated within a 7-month period. These time limits

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47 *Id.*, ¶ 18.

48 *Id.*, ¶ 28.

would roughly parallel those imposed by the Commission (5 and 9 months) in program access proceedings, for refusals to deal and discrimination complaints respectively.[49]

V. CONCLUSION

In conclusion, EchoStar urges that the Commission to adopt regulations implementing Section 325(b) consistent with the foregoing comments.

Respectfully submitted,

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49 *Id.*, ¶ 41.

CERTIFICATE OF SERVICE

I, Colleen Sechrest, hereby declare that the foregoing Comments of EchoStar Satellite Corporation was sent this 12th day of January, 2000 by messenger to the following:

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